BRARY
SUPREME COURT, U.S.
OCT 31 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-646

A/S ARCADIA,

Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1975

No. .....

A/S ARCADIA,

Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

Opinions Below

The opinion of the Court of Appeals is reported at —— F.2d ——. The opinion of the District Court is reported at 386 F. Supp. 1081. Both opinions are reprinted in the Appendix hereto at pp. 1A and 21A respectively.

Jurisdiction

The judgment of the District Court was entered on October 23, 1974 (p. 28A). The judgment of the Court of Appeals was rendered on June 18, 1975 (p. 1A). The orders of the Court of Appeals denying rehearing and

rehearing in banc were entered on the 5th day of August, 1975 (pp. 15A, 17A).

The jurisdiction in this Court is invoked under 28 USC §1254(1) and 28 USC §2101(c).

Questions Presented For Review

1(a) Was it not the intent of Congress in amending the LHWCA* in 1972 that the stevedore employer bear the burden of workmen's compensation and the shipowner the responsibility for its negligence?

(b) Has not this intent been misconstrued and frustrated by the decision of the Court of Appeals which holds that a stevedore, although itself negligent, may nevertheless recoup compensation benefits paid to an injured longshoreman from the latter's recovery against the shipowner?

2(a) Does not the decision of the Court of Appeals upset the *quid pro quo* established by Congress among longshoremen, shipowners and stevedores so as to impose on the shipowner an obligation to indemnify the negligent stevedore for the latter's compensation payments?

(b) Does not such an interpretation of the LHWCA call its constitutionality into question?

3. Under the circumstances may not this Court interpret the LHWCA to conform to Congressional intent or fashion a rule of its own to achieve that purpose?

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* Longshoremen's and Harbor Workers' Compensation Act 33 USC 901 et seq. Changes made by Public Law 92-576, approved October 27, 1972.

Statutes Involved

33 USC §905(b)

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Statement of the Case

The District Court's jurisdiction was based upon 28 USC §1332—Diversity of Citizenship. Appellate jurisdiction in the United States Court of Appeals for the Second Circuit was based on 28 USC 1291, an appeal from a final judgment or order following certification by the District Court under FRCP 54(b) that there was no just reason for delay.

This is an action by Ronald Landon, a longshoreman employee of Pittston Stevedoring Corp., to recover damages for personal injuries sustained while working aboard petitioner's vessel, m/s Hoegh Opal on February 7, 1973.

Pittston's compensation carrier under the LHWCA was respondent, Gulf Insurance Company. Petitioner moved to join Gulf as a party plaintiff pursuant to Federal Rule 19(a) and the District Court granted this motion. Respondent answered and petitioner then moved to strike an affirmative defense of Gulf which sought to recoup the amount of compensation paid should plaintiff prevail against petitioner. Gulf moved to dismiss the 19(a) complaint. The District Court in an opinion (21A) granted the latter motion and denied the motion to strike the defense of Gulf, thereby upholding the lien claim. The District Court certified there was no just reason for delay under 54(b) of the Federal Rules of Civil Procedure and ordered entry of judgment (19A). The shipowner appealed and following oral argument on May 21, 1975 the Court in a written opinion dated June 18, 1975 affirmed the District Court's decision.

Thereafter, the shipowner filed a timely petition for rehearing and rehearing in banc and these were denied without opinion in orders entered on August 5, 1975 (15A & 17A).

The Facts

Plaintiff, Ronald Landon, has alleged that he was a longshoreman employed by Pittston Stevedoring Corp. working on petitioner's vessel, the m/s Hoegh Opal, February 7, 1973. According to plaintiff's answers to interrogatories, he arrived aboard the vessel at 8 a.m. The accident happened at 8:48. It is his claim that due to the negligence of petitioner, he slipped, fell and was in-

jured on snow and ice allowed to accumulate on the vessel's main deck, offshore side of No. 4 hatch (21A).

The above simple setting translates into the type of situation, which if proved, imposes a measure of responsibility for working conditions aboard the vessel upon both shipowner and stevedore. Indeed, it is the primary responsibility of the employer under the LHWCA (33 USC 941) "to render safe such employment and places of employment and to prevent injury to his employee". The Safety and Health Regulations for Longshoremen promulgated January 1972, under 33 USC 941 state

> "§ 1918.2(a) The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in §1504.3(c)."

The Regulations are precise as to the claim of snow and ice conditions.

§ 1918.9(c)

> "Slippery conditions shall be eliminated as they occur."

Benefits were paid plaintiff under the Act in terms of $736 for compensation and $377 medical. While these are modest in amount, the decision of the Court of Appeals permits the subrogated compensation carrier to escape even this liability by obtaining it back from any recovery by plaintiff against petitioner, irrespective of the responsibility of its assured Pittston for causing the injury.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals, transferring the stevedore's responsibility to pay compensation to the shipowner, frustrates the intention of Congress in amending the LHWCA and recasting the liabilities of shipowner and stevedore so as to insure that the former would be liable only for its negligence, and not unseaworthiness, and the latter would be liable for compensation and not indemnification.

It is submitted that it was the intention of Congress that the stevedore or at least the negligent stevedore bear its own compensation liability for the following reasons:

1. *The stevedore, who, as employer is primarily responsible for the safety of its own personnel, would lose that motivation and incentive if it could foist its compensation liability off on a partially negligent shipowner.*

Little more need be said as to Congressional policy than to cite Senate Report 92-1125, 92nd Congress, 2nd Session

> SAFETY
>
> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> This consideration is particularly crucial with respect to high-risk occupations such as those cov-

> ered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement.

House of Representatives Report No. 92-1141, 2nd Session, also states in part under PURPOSE AND BACKGROUND OF LEGISLATION:

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety. . .

What incentive, may it be asked, is there for a stevedore to adopt safety measures for the protection of its personnel when the entire initial cost of paying compensation and medical benefits is then transferred to a shipowner who may be guilty of only a modicum of negligence?

Additionally, how can the financial exoneration of the stevedore and/or its compensation underwriter possibly assure "that the employer bears the cost of unsafe conditions", and "serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety"?

Indeed, what incentives to settlement of post 1972 litigation exist when the stevedore, safeguarded almost as an endangered species, may, from its sanctuary, disdain to waive any or all of its lien claim?

It is submitted that the decision below, assuring the stevedore the full return of its compensation and medical outlay for permitting its employees to work on the vessel's deck where snow and ice accumulations were underfoot, is strikingly and diametrically opposed to Congressional intent.

It may also be said that Congress and this Court are of the same mind on this subject. In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 323 (1964) this Court, addressing itself to the considerations that underlay the now enfeebled warranty of workmanlike service observed,

> "For they illustrate that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

2. *As a corollary to No. 1 supra, the elimination of the threat of indemnification as a safety incentive to the stevedore, strengthens the proposition that Congress intended the negligent stevedore not escape its remaining motivation toward that end—its obligation to pay compensation.*

Both the text of the Act in Section 905 and the legislative history confirm that the shipowner is now without recourse against, and may no longer recover indemnification from, the stevedore for breach of the latter's warranty of workmanlike service as defined in *Ryan* v. *Pan Atlantic Stevedoring Corp.*, 350 U.S. 124 (1956). This Court there held that the exclusivity provision of the then existing LHWCA did not preclude an action for

indemnification by a shipowner. Influencing this Court were such considerations as expressed on p. 133, that "Competency and safety of stowage are inescapable elements of the service undertaken". Thus, redress could be from the stevedore when the accident resulted from a breach of either of the twin warranty components of competency or safety. Balance was achieved by this Court's decision in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 (1958), where, despite a stevedore's breach of the warranty of workmanlike service, indemnity to the shipowner was permitted only "absent conduct on its part sufficient to preclude recovery". Essentially, this devolved over the years into a test as to who was most responsible for the injury, or as previously seen in *Italia* supra, p. 323 placing liability "upon the party situated to adopt preventive measures and thereby to reduce the likelihood of injury".

With indemnification now foreclosed, gone with it are all the stimuli to safety consistently stressed by this Court in such decisions. While the LHWCA legislative history indicates by repeated references to *Ryan*, an advised resolve to terminate the indemnity cause of action to a shipowner, no expression is found in any of the hearings evincing a similar determination to remove the last surviving safety incentive to the employer, namely the burden of workmen's compensation. Quite the contrary as we have seen in No. 1 supra. Having taken away the threat of indemnification as a safety motivation, it can be soundly reasoned that Congress intended that the only remaining incentive to the same end, that of compensation, not be removed or transferred to the shipowner, at least under circumstances where the shipowner and stevedore share responsibility for the accident.

3. Section 933 *has never contained a provision for a "lien" on an employee's recovery against a third-party.*

To read one in now would be inconsistent with the policies of the new Act. When Congress wanted to impress a lien it had no difficulty in expressing itself in those precise terms. See 33 USC 917. What has existed in §933 is an assignment to the stevedore following a formal award. A "lien" has been judicially wrought into this section. It has been described in *Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975) (rehearing denied, 515 F.2d 571; petition for a writ of certiorari filed October 1, 1975, 44 L.W. 3230)

> "as a remedy the Courts have found implicit in the statutory scheme, although it is not specifically granted by the statute. See *Pope and Talbot, Inc.* v. *Hawn*, 1953, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143, *The Etna*, 3rd Cir. 1943, 138 F.2d 37."

We have now witnessed a general and drastic revamping by Congress of the respective rights and obligations of the injured employee, the stevedore and the shipowner. In so doing, Congress has neither in the legislative history nor in the changes to the Act itself, discussed the perpetuation of a "lien" which serves no purpose than to dissuade the stevedore from safety measures. It is submitted that this Congressional stillness rather than being thought an acquiesence in a now outmoded remedy, is more an affirmation that the newly defined rights and obligations of the parties, anguished and labored over for a period of five years, represents the full body of such rights and obligations, and there are no holdover remedies which prior adjudications may have found implicit in the old Act.

Indeed, it is appropriate to say, as petitioner has urged in the Courts below, that Congress not only negatively rejected the lien theory, but affirmatively preserved to the

stevedore (and/or its underwriter) the means by which it could recover its compensation expenditures from a negligent shipowner. See §905(b) of Title 33

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or *anyone otherwise entitled* to recover damages by reason thereof may bring an action against such vessel * * * ". (Emphasis added)

This amounts to no more than a codification of this Court's decision in *Federal Marine Terminal, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969) which the Court of Appeals suggested, but did not decide, may no longer have validity. It is perhaps here that the Court below may have taken the wrong fork. In order to achieve success in a *Burnside* cause of action, unlike a lien theory where as the Court below has held the stevedore's fault is irrelevant, this Court assumed (p. 418) that the stevedore was "faultless vis-a-vis" the shipowner. Since the stevedore would not realize its compensation expenditures unless itself free from negligence, the *Burnside* avenue to recovery of such amounts comports more, not with only safety considerations, but also the *quid pro quo* argument, (infra II) than does the lien route, which offers no economic incentive to the stevedore to be free of negligence, and imposes upon the shipowner, already shorn of its indemnity cause of action, the obligation to indemnify that stevedore for its compensation benefits, irrespective of the latter's negligence.

II.

The decision of the Court of Appeals upholding a lien theory upsets the delicately balanced *quid pro quo* set up by Congress and raises an issue of constitutional dimensions.

When *Ryan Stevedoring Company, Inc.* v. *Pan Atlantic Steamship Corp.* was decided, 350 U.S. 124 (1956) this Court noted (p. 129) that while the LHWCA prescribed a *quid pro quo* between the longshoreman and stevedore, there was no comparable exchange for a shipowner, who was obliged to pay a longshoreman's judgment for damages. Any such restriction of the shipowner's rights over would therefore do violence to the *quid pro quo* rationale which underscored the constitutionality of compensation statutes.*

The purported *quid pro quo* for stripping the shipowner of its cause of action for indemnity, was according to the Court below (11A), the elimination of the longshoreman's claim for unseaworthiness. In the tri-cornered Congressional trade off, it would seem that the shipowner came out no better than third. Thus, the longshoremen received higher benefits and retained their third-party rights against the shipowner, albeit on a narrower theory of recovery (negligence, but no longer unseaworthiness). The stevedore paid higher compensation benefits but no longer had to contend with an action for indemnification by the shipowner. The shipowner in turn continued to be exposed to a negligence cause of action by the longshoremen but completely lost its action for relief over against the stevedore.

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* *N.Y. Central R.R. Co.* v. *White*, 243 U.S. 188 (1917); *Crowell* v. *Benson*, 285 U.S. 22 (1932).

In most instances what may be described as unseaworthiness may also be marched into court, with only minor adjustments in approach, under the banner of negligence. See, for example, *Waldron* v. *Moore-McCormack Lines*, 386 U.S. 724 (1967). Apart from its convertibility features, the negligence cause of action still subjects the shipowner, as this Court described in the *quid pro quo* discussion in *Ryan*, supra p. 129 to the "full amount of a longshoreman's damages".

It should be stressed that by reciting or even lamenting the above, petitioner does not seek to have this Court untie the bargain made before Congress, but is merely attempting to maintain what little it was given. The teetering *quid pro quo* which contemplates the stevedore paying a higher compensation benefit to the injured longshoreman, topples when the shipowner is required to make the stevedore whole for the latter's compensation obligation.

The *quid pro quo* reasoning again was recognized by this Court in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.*, 394 U.S. 404 (1969) when it observed (p. 413) that Congress had not then intervened in the relationship between the stevedore contractor and the shipowner. Consequently, no obstacle was found to allowing a blameless stevedore to sue a shipowner for its compensation payments paid to an employee's estate—a remedy apart from whatever lien or subrogation rights existed under the LHWCA.

Since Congress, however, has now explicitly adjusted the relationship between shipowner and stevedore, by foreclosing an indemnity cause of action to the shipowner, the *quid pro quo* no longer exists if the stevedore and/or its underwriter remain able to recoup compensation benefits

from the shipowner regardless of the stevedore's own responsibility in bringing about the employee's injury. Thus, while a *Burnside* cause of action, which assumes a "faultless" stevedore, can survive a *quid pro quo* challenge, a "lien" theory claim cannot.

III.

In the absence of clear Congressional intent, this Court may interpret the new LHWCA, or fashion a rule, whereby a stevedore partially at fault with a shipowner for a longshoreman's injury, may not recoup its compensation payments from that shipowner.

Petitioner submits that sufficient reasons have been advanced for this Court to conclude from an interpretation of the new LHWCA that Congress never intended that a negligent stevedore and/or its underwriter be permitted to recoup the amount of its compensation benefits from a longshoreman's recovery against a shipowner. Additionally, since the so-called "lien" theory of recovery has arisen more from judicial interpretation than Congressional language, no difficulty should exist for this Court in fashioning its own rule, one in harmony with policies of both this Court and Congress to provide safety incentives and to maintain a *quid pro quo* among the parties.

In *Halcyon Lines, et al.* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1953) this Court then thought it unwise (p. 285) to fashion new rules of contribution which it said should await Congressional action, observing at the same time that "in maritime affairs" Courts,

> "have felt freer than the common law courts in fashioning rules and we would feel free to do so here if wholly convinced that it would best serve the ends of justice".

It is submitted that on the strength of the arguments presented, Congress favors the position urged by petitioner, and if any further rules are needed in the interest of justice, to fill in the interstices in the Act, then this Court, under its own evaluation of its power, is free to do so. See also *Pope and Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953).

Pope and Talbot v. *Hawn* also mentions (p. 412) that a reduction of the shipowner's liability at the expense of the stevedore would be "the substantial equivalent of contribution which we declined to require in the *Halcyon* case". *Cooper Stevedoring Co.* v. *Kopke Inc.*, 417 U.S. 106, (which involved a pre-amendment accident), while extolling contribution generally, adhered to the *Halcyon* rule that the shipowner could not obtain contribution for its damages from the employing stevedore, noting that any rule of contribution then set up might have been "inconsistent with the balance struck by Congress in The Harbor Workers' Act between the interests of carriers, employers, employees and their respective insurers * * *". But what the shipowner urges here, however, is only contribution in the broadest sense to mean that the stevedore "contribute" what the 92nd Congress intended it should contribute, namely its compensation obligation. In only this way will the "balance struck by Congress" be preserved.

It can also be maintained that as indemnity has receded both legislatively and judicially, so too has contribution grown in respectability in the maritime law and elsewhere. *United States* v. *Seckinger*, 397 U.S. 203, 215 (1970); *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974) and *United States* v. *Reliable Transfer Co., Inc.*, —— U.S. —— 44, L. Ed. 251 (1975).

Eminent and recent authority* hints that the time may have come when this Court might itself wish to "fashion" a comparative negligence rule in this area.

> "On grounds of policy there is much to be said for casting the employer in liability according to the degree of his fault: it gives him an incentive to take appropriate steps to protect his employees from dangerous conditions for which the shipowner is responsible."

Where the stated language of the LHWCA is capable of a construction which frustrates or distorts its purpose, this Court has in the past not found itself powerless to act. See *Reed* v. *s/s Yaka,* 373 U.S. 410, 415 (1963)

> "In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute . . .",

citing language from *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953) that the LHWCA "must be liberally construed in conformance with its purpose, and in a way, which avoids harsh and incongruous results".

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* *Gilmore and Black*—The Law of Admiralty, 2nd Edition, 1975, p. 451.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

Dated: New York, N. Y.
October 31, 1975

Respectfully submitted,

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APPENDIX

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Judgment of District Court 28A

Opinion of Court of Appeals
June 18, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 590—September Term, 1974.

(Argued May 21, 1975 Decided June 18, 1975.)

Docket No. 74-2304

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, *Judge*, dismissing appellant shipowner's Rule 19 complaint joining a stevedore's subrogated insurance carrier. *Held*, that the stevedore's carrier could not be sued

by the shipowner for concurrent negligence of the stevedore under the 1972 amendments to § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

Affirmed.

JOSEPH T. STEARNS, New York, N.Y. (J. Ward O'Neill, Richard A. Corwin, and Haight, Gardner, Poor & Havens, New York, N.Y., of counsel), *for Defendant-Appellant.*

PHILIP F. DICOSTANZO, Brooklyn, New York (Robert Klonsky, Anthony J. Cutrona, and DiCostanzo, Klonsky & Cutrona, Brooklyn, New York, of counsel), *for Involuntary Plaintiff-Appellee.*

Before:

MULLIGAN, TIMBERS and GURFEIN,
Circuit Judges.

GURFEIN, *Circuit Judge:*

This is a case of first impression in this circuit on the effect of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (the "Act") with respect to a claim by a shipowner against the stevedore employer of an injured longshoreman. It marks another episode in the continuing struggle of shipowner against stevedore.

This is a personal injury action brought by a longshoreman, Ronald Landon, against the shipowner, A/S ARCADIA, sued as Lief Hoegh & Co., Inc. The plaintiff claims to have been injured on the deck of defendant's vessel, M/S

HOEGH OPAL, while at work near her No. 4 hatch. The accident occurred February 7, 1973 after the effective date of the 1972 amendments to the Act. Gulf Insurance Company ("Gulf") is the compensation carrier for plaintiff's employer, Pittston Stevedoring Corporation ("Pittston"). Plaintiff received benefits under the Act for temporary total disability in the amount of $736 and also received the benefit of the insurer's expenditure of $377 for medical attention rendered to the plaintiff. Gulf notified the shipowner's Claim Bureau that it claims an "indemnity lien" for the total amount of compensation benefits extended to the plaintiff.

The shipowner moved to join Gulf as a necessary party plaintiff pursuant to Rule 19(a), and to implead Pittston as a third-party defendant under Rule 14. Judge Dooling granted the motion. Pittston was not served.[1]

The shipowner alleged in the Rule 19 complaint that "[Gulf] may have a claim against the defendant" [shipowner] by virtue of its payment of compensation and medical expenses to and for the plaintiff pursuant to 33 U.S.C. § 33(h), under which Gulf was subrogated to the rights of its insured, Pittston. It alleged further that if the plaintiff sustained any injury the injury was caused by the contributing negligence of the plaintiff for whose actions Pittston and Gulf are responsible. The defendant shipowner demanded judgment extinguishing any claim of

[1] Rule 19(a) provides that a person subject to service of process, whose joinder will not deprive the court of subject matter jurisdiction shall be joined "if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest."

Gulf against the defendant for the amount of any compensation paid or to be paid to the plaintiff.

Gulf, the involuntary plaintiff, filed an answer seeking dismissal of the Rule 19(a) complaint, and also counterclaimed for the full amount of its compensation lien if plaintiff should recover. The shipowner moved to strike the affirmative defense of Gulf that the § 19(a) complaint failed to state a claim for relief. Gulf then moved to dismiss the § 19(a) complaint. The District Court denied the motion to strike the affirmative defense of Gulf and granted the motion to dismiss. The District Court certified that there is no just reason for delay, F. R. Civ. P. 54(b), ordering entry of judgment. We consider the appeal.

By a 1972 amendment to section 5, the Act provides in 33 U.S.C. § 905(b) in pertinent part as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services

to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." As amended Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

Though the statute states that the shipowner cannot sue "the employer," [the stevedore] it does not specifically say that the stevedore cannot sue the shipowner. The appellant shipowner constructs an argument as follows:

The employer (or his carrier) has no "lien" on any recovery to which the plaintiff may be found entitled. What it has instead is a claim, a "cause of action" *against the shipowner* to recover damages for the shipowner's negligence to the extent of its exposure for compensation payments made for the benefit of the plaintiff. The employer Pittston (or its carrier) must assert this claim in this action because its claim to recover compensation payments is subject to defeat by proof of concurring negligence on the part of any employee of Pittston.

The appellant shipowner also moved to interpret the 1972 amendment to mean that the plaintiff can recover against it, in any event, only upon proof that his accident was caused by the *sole* negligence of the shipowner without any negligence whatever of the stevedore-employer contributing thereto. This ingenious argument requires a review of the situation antecedent to the 1972 amendments. The 1972 amendments provided for a substantially increased level of benefits (33 U.S.C. § 906(b)), with more employees covered, and, aside from important administrative changes,

made their most significant changes in section 5 quoted above, by repealing the right of a longshoreman to sue a ship for unseaworthiness and abolishing breach of warranty claims by the ship against the stevedore-employer.

The appellant recognizes at the outset that the Supreme Court in *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 411-12 (1953) held that section 33 of the Act, 33 U.S.C. § 933, has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injury, and that, in any event, a reduction of the shipowner's liability to the plaintiff by the amount of the compensation payments would be the substantial equivalent of contribution by the employer, which the Court declined to require in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282. Appellant contends, however, that *Federal Marine Terminals* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969) overruled *Pope & Talbot, supra*, which is said to be no longer controlling.

Appellant contends that *Burnside, supra*, established that an employer-stevedore has a direct common law claim for the recovery of his compensation payments against the shipowner, rather than a lien against the proceeds of plaintiff's recovery. In view of such direct claim he is said to be a proper party and, once joined, is subject to a counterclaim for concurrent negligence.[2]

In the *Burnside* case, a shipowner sued a stevedore seeking indemnification for any judgment which the shipowner might be required to pay in a maritime wrongful death action brought by the executrix of an employee of

[2] When we refer to the employer-stevedore we also include its compensation insurance carrier, Gulf. 33 U.S.C. § 933(h).

the stevedore. The stevedore counterclaimed for the compensation it was required to pay to the widow and children. The counterclaim was dismissed on summary judgment and affirmed by the Court of Appeals. The Supreme Court reversed.

Generally, the right of subrogation ("assignment" to the employer, § 33(b) of the Act) which is afforded the stevedore's insurance carrier under § 33(h) suffices to permit it to recover the full amount of the compensation paid out of plaintiff's larger recovery. In *Burnside*, however, the applicable Illinois Wrongful Death Act limited the amount recoverable by the decedent's representatives to $30,000, far short of the stevedore's potential compensation liability of $70,000. The *Burnside* action turned on whether the stevedore had a claim against the shipowner for his whole compensation liability, including that amount in excess of his right of subrogation under Section 33. The Supreme Court held that the stevedore had such a claim against the shipowner. It emphasized, however, that this was not based on any theory of shared responsibility for joint negligence, and was not a departure from *Halcyon*, *supra*, 394 U.S. at 417-18; it was founded not on the shipowner's wrong to the *longshoreman*, but on its "independent wrong" to the *stevedore* in failing to provide a safe place to work which had caused the *stevedore* damage. 394 U.S. at 418.

Burnside did not, however, overrule *Halcyon*, nor *Pope & Talbot*. The rule still remains that the shipowner may not deduct the compensation payments from the plaintiff's recovery but must pay them to the employer under section 33 of the Act. Only if there is a shortfall, as in the rather unusual circumstances of the *Burnside* case, is there any necessity for the employer to resort to a common law claim

for the excess above the subrogated amount. In that event, he sues not on the theory of concurrent negligence to the plaintiff, but on the theory of direct negligence by the shipowner alone. This is an action he may never be in a position to bring. His notice of claim of an "indemnity lien" is not notice that he will bring such an action. Nor does the language of *Pope & Talbot* support appellant's view that the right of subrogation of the employer is different from a lien "to recoup his compensation payments *out of any recovery* from a third person." 346 U.S. at 412. (Emphasis added.)[3]

Thus there is no claim by the employer, based on concurrent negligence for contribution (*Halcyon*)[4] or indemnity (§ 905(b)), which generally would require that he be made a party to the action for the protection of the shipowner. His *Burnside* claim for relief would only become

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[3] It is true, of course, that section 33(b) does not speak in the language of "lien" but of "an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person", and provides that the employer, after six months "may . . . institute proceedings for the recovery of such damages" (§ 33(d)), but under the law, the compensation payment recoupment may not be defeated on the theory of concurrent negligence, in any event. As Judge Dooling observed below, " 'Lien' is simply a shorthand and approximate expression." In common parlance the right of the carrier is to share in the proceeds of the plaintiff's recovery and is referred to as a "lien."

[4] In *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974), the Court held that contribution would lie in a maritime noncollision case where the stevedore which was sued for contribution by the ship was *not* the employer of the plaintiff longshoreman. The Court said that where the stevedore was the employer "our decision in Halcyon was, and still is, good law on its facts." 417 U.S. at 115.

But a commentator has queried whether the language of § 905 (b) was meant to adopt the rule of the *Halcyon* case. Gilmore & Black, Law of Admiralty, p. 451 (2nd Ed. 1975). We see nothing in the statute to exclude it.

a practical remedy if it still exists, after it is determined that the compensation payments exceed the plaintiff's recovery. There is no ground to assume that such a claim for relief will be brought.

Accordingly, the employer is not an indispensable party under Rule 19(a). In the employer's absence, complete relief can be accorded among those already parties. The interest he claims is not in the litigation between the plaintiff and ship, but only in the plaintiff's recovery. It is not true that the ship will be under a substantial risk of double, multiple or otherwise inconsistent obligations, for if the plaintiff's recovery exceeds the compensation lien, the carrier will have its damages fully compensated for with no further risk to the ship. If the recovery is for less than the compensation lien, the damages to the employer or its carrier will have been reduced *pro tanto*. At worst the employer might be liable, in an independent cause of action, for an excess above the compensation lien which, by hypothesis, it had not been required to pay to the plaintiff in the original action.[5] The employer is not a necessary party under 19(b) because it has no claim until the plaintiff has recovered against the ship, and because the employee is a statutory trustee of an express trust for the benefit of the employer. Rule 17(a). See *Pyle* v. *Kansas Gas & Electric Co.*, 23 F.R.D. 148 (D. Kan. 1959). It is safe to say there will be no double recovery, and relatively

[5] Under § 33(f) the employer shall be required to pay as compensation "a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person." Any *Burnside* action by the carrier for an excess over plaintiff's recovery would only be brought after the plaintiff's recovery had been established to be less than his compensation entitlement. The dictum in *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 381-82 (1949) that an insurance carrier is a necessary though not an indispensable party, is inapplicable for the foregoing reason.

few cases are likely to go to verdict where the recovery will be less than the lien.

We think, then, that even if Congress intended the *Burnside* rule to stand, a court should hold the stevedore (or his carrier) not to be an indispensable or a necessary party.

It may be, too, that a *Burnside* type of action no longer exists in the light of the provision that "the remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." 33 U.S.C. § 905(b). But that is a question we need not decide.[6]

It is evident from the history of the 1972 amendment that it was a compromise between shipowners and stevedores, with the interest of longshoremen and employees paramount.[7]

The situation as it existed just prior to the 1972 amendments is familiar. The longshoreman's rate of compensation for injuries had not been raised by the Congress since 1961. The employer-stevedores contended that it was hard for them to pay any higher compensation because the compensation obligation had come to be not their only liability under Supreme Court precedents. The Supreme Court held in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946) that a longshoreman, like a seaman, could sue a shipowner for breach of warranty of unseaworthiness,

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[6] The argument would be that section 905(b) includes employer and carrier in the phrase "or anyone otherwise entitled to recover damages by reason thereof" and allows only actions under section 933 which includes subrogation actions.

[7] See *Lucas* v. *"Brinknes" Schiffharts Ges.,* 379 F.Supp. 759 (E.D. Pa. 1974), a comprehensive opinion by Judge Huyett for an *ad hoc* panel of three district judges, for some of the colloquy in the Senate subcommittee, 379 F. Supp. at 767-72, which it is unnecessary to repeat.

without proof of negligence. This liability for unseaworthiness thus imposed was absolute and non-delegable. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944). If the stevedore had caused the unseaworthiness, he was held to be liable for his own breach of the warranty of workmanlike performance, and was liable to indemnify the shipowner, even though the stevedore could not have been sued directly by his employee, the longshoreman, because the latter's remedy against his employer was exclusively for compensation under the Act. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956). The majority in *Ryan* stressed the fact that "the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages", *supra*, 350 U.S. at 129. Congress has now given the shipowner his *quid pro quo* in the abolition of a longshoreman's right to recover on unseaworthiness.

In formulating the 1972 amendment to section 5 of the Act, 33 U.S.C. § 905(b), the Congress surveyed the tides of existing judicial doctrine. In amending the Act it apparently had several things in mind. The shipowner had been hard hit by the *Sieracki* application of the unseaworthiness doctrine to longshoremen. The stevedore had been hard hit by the *Ryan* doctrine. The shipowners contended before the Congressional committees that they needed the *Ryan* doctrine if they were to be held liable under the *Sieracki* doctrine. The stevedores complained that if they were required to make substantially higher compensation payments, they should be protected against the *Ryan* doctrine.

Excerpts from the House Report No. 1441 (Education and Labor Committee), U.S. Code Congressional and Administrative News, 92nd Cong., 2nd Sess., pp. 4698 et seq.

(1972) tell the story of the legislative compromise. After stating the background[8] the Committee referred to the *Sieracki* and *Ryan* doctrines, and stated that "[t]he rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." *Id.* at 473. In permitting the longshoreman to retain his right to sue the shipowner for negligence, the Committee intended to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore." *Id.*

"The Committee also believes that the doctrine of the *Ryan* case . . . is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. . . .

"Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.[9]

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[8] "Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen." H.R. No. 1441, U.S. Code Cong. & Adm. News, 92nd Cong. 2nd Sess. at p. 4699.

[9] This has been interpreted to mean that "the amendments restored the exclusive liability provisions of the Longshoremen's Act . . ." Gorman, The Longshoremen's and Harbor Workers' Com-

"Under the proposed amendments the vessel may not by contractual agreement *or otherwise* require the employer to indemnify it, in whole or *in part*, for such damages." 4704-05. (Emphasis added.) We read the emphasis "in whole or in part" to mean to exclude liability by the employer to any extent including the amount of the compensation payments. If Congress had intended otherwise, it would simply have excluded employer liability for concurrent negligence "except to the extent of its compensation payments." We think it is significant that no such exception was made.

Appellant's second argument that the plaintiff may not recover against the shipowner unless he proves that the ship's negligence was *solely* responsible for his injury is strictly not before us on this interlocutory appeal. However, because the contention may be raised in trials in the district courts of the circuit in actions covered by the 1972 amendments, we feel we should address ourselves to the contention which we believe to be insubstantial.

First, the draftsmen of section 5(b), 33 U.S.C. § 905(b) could easily have inserted the word "sole" so that the clause would have read "caused by the 'sole' negligence of the vessel." Nothing has been called to our attention to indicate such intention. Second, Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees. Third, the scheme of the Act is to provide workmen's compensation for a longshoreman from his own employer, but with a right to sue the ship for negligence. We cannot agree that some negligence by the employer is enough to cut off the injured

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pensation Act—After the 1972 Amendments, Journal of Maritime Law and Commerce, October 1974, p. 1.

longshoreman's protected right to sue the ship for its own negligence.[10] Of course, if the negligence was *solely* that of the stevedore, the ship would have been found neither negligent nor liable.

Affirmed.

[10] The appellant makes the practical argument that under Judge Dooling's decision it will be more difficult for shipowners to settle longshoremen cases, since there is no incentive on the stevedore (or its carrier) to reduce its compensation lien to help the settlement if it is not subject to the defense of concurrent negligence. That may be true in some cases, but it is only one consideration in the whole congeries of relations involved and should be addressed to Congress.

Order of Court of Appeals Denying Rehearing
August 5, 1975

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

74-2304

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of August, one thousand nine hundred and seventy-five.

Present:

HON. WILLIAM H. MULLIGAN,
HON. WILLIAM H. TIMBERS,
HON. MURRAY I. GURFEIN,

Circuit Judges.

RONALD LANDON,

Plaintiff,

v.

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

v.

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

Order of Court of Appeals Denying Rehearing
August 5, 1975

A petition for a rehearing having been filed herein by counsel for the defendant-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

Order of Court of Appeals Denying Rehearing *in banc*
August 5, 1975

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

No. 74-2304

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of August, one thousand nine hundred and seventy-five.

RONALD LANDON,

Plaintiff,

v.

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

v.

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

Order of Court of Appeals Denying Rehearing in banc
August 5, 1975

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

Order of District Court
March 12, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 1232

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff Seeking Joinder,"

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff.

It appearing that a question has arisen about whether or not the Memorandum and Order dated October 10, 1974, was intended as and was adequate as a determination that there was no just reason for delay in the entry of final judgment in Gulf's favor (Rule 54(b)), and the Court of Appeals having granted appellant leave to apply to this Court under Rule 60(a) for relief from the failure

of the Memorandum and Order to use the precise language of Rule 54(b), it is

ORDERED that the Memorandum and Order of October 10, 1974, is amended at page 9 line 16 by deleting the period at the end of sentence and adding the following words and punctuation marks, to wit:

> and it is, therefore, determined that there is no just reason for delay in the entry of a final judgment as to the Plaintiff or Defendant or Involuntary plaintiff GULF INSURANCE COMPANY.

Brooklyn, New York
March 12, 1975.

JOHN F. DOOLEY, JR.
U. S. D. J.

Opinion of District Court
October 10, 1974

No. 73 C 1232.

RONALD LANDON,

Plaintiff,

v.

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff Seeking Joinder,"

v.

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff.

MEMORANDUM and ORDER

DOOLING, *District Judge.*

In this action, commenced on August 16, 1973 plaintiff longshoreman, an employee of Pittston Stevedoring Corp. while aboard the vessel Hoegh Opel on February 7, 1973, through the alleged negligence of the defendant bareboat charterer in allowing snow and ice to accumulate on the top deck, sustained personal injuries when he slipped and fell; he seeks to recover damages against the defendant

shipowner. Defendant denies that it was negligent and alleges that plaintiff's own negligence caused or contributed to his injury. Plaintiff's answer to defendants' interrogatory asserted unseaworthiness in the accumulation of ice and snow on the offshore side of the No. 4 hatch, top deck, where the accident allegedly occurred.

Defendant sought and obtained leave to join Gulf Insurance Company as a necessary party and also to join Pittston as a third party defendant against whom it could claim a pro rata reduction of any liability to plaintiff. Gulf was Pittston's Longshoremen's and Harbor Workers' Compensation Act carrier and it had allegedly made $736 of disability payments to plaintiff and paid medical expenses of $377, pursuant to the Act, by reason of the injury sued upon, and it had by notice claimed a lien—an "indemnity lien"—in that amount. The theory of the motion, as to Gulf, was that the "indemnity lien" of Gulf under 33 U.S.C. § 933(b), (h), (which subrogates the carrier (Gulf) to the employer's (Pittston's) rights under 33 U.S.C. § 933(b), (d), (e), (f) and (g), which define the employer's and hence the carrier's right to be made whole out of a longshoreman's third party cause of action for medical benefit paid for and compensation payments made to the longshoreman) is in law a statutory claim directly against the third-party wrongdoer (defendant) and is not simply a "lien." A claimed consequence is that the stevedore's (Pittston's) contributing negligence should be a defense (or base for liability apportionment) to a third party sued by a longshoreman. Gulf takes the position that the stevedore, although it has Section 933 rights by "assignment" to which its carrier is subrogated, cannot be sued under the Act as amended effective October 27, 1972, because new Section 905(b) explicitly and purposefully so provides.

The long-familiar scheme of the Act is to grant the longshoreman wage compensation (Section 908) and medical benefits (Section 907) for injuries sustained on the job without proof of employer fault (Section 904), to make the employer's liability under the Act exclusive of all other liability to the employee (Section 905) and the employee's exclusive remedy for the negligence or wrong of his fellow employees (Section 933(i)). However, the employee retains the right to sue any third person liable to him in damages for the same injury. If the employee has accepted compensation "under an award in a compensation order," that operates to assign the employee's right to recover damages from a third-party wrongdoer unless the employee sues the third party within six months after the award. The employer (or his subrogated carrier) retains out of the recovery the expense of suit, the amount of medical benefit expended, the compensation paid, and the present value of future compensation and benefits and pays the balance to the employee. If the employee sues, the employer is liable for compensation and benefit only to the extent that the amount of it exceeds the third-party recovery. It will be seen from this that "lien" is simply a shorthand and approximate expression, and is not an exact legal description of the employer's interest in the third party action.

Before the 1972 changes the third party tort-feasor, typically the shipowner, could claim over against an employer whose fault rendered him liable to the shipowner for the shipowner's being mulcted in damages by the employee. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133. Earlier, Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143, has made it clear that the shipowner was liable for the whole damage without reduction for compensation pay-

ments made by the employer, and still earlier Halycon Lines v. Haenn Ship Ceiling & Refitting Corp., 1952, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 had held that where shipowner and employer were in concurrent fault, the whole damage recovered by the employee against the shipowner could not be apportioned between shipowner and employer under any doctrine of contribution. A later-developed corollary of *Ryan* was that certain kinds of breaches of duty owned by shipowner to stevedore could preclude the shipowner from successfully claiming-over against the stevedore. Weyerhauser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 567, 78 S.Ct. 438, 2 L.Ed. 2d 491. More recently Federal Marine Terminals v. Burnside Shipping Co., 1969, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371, declined to hold the employer was limited to his rights under Section 933. There the third party recovery for wrongful death because of a statutory ceiling would inevitably be smaller than the compensation payments. The employer, the court held, could claim against the ship for the whole of the compensation payments if it showed that the ship had breached a duty owed to it. Most recently Cooper Stevedoring Co. v. Fritz Kopke, Inc., 1974, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694, has held that where the shipowner impleads a third party wrongdoer other than the employer, and who could, therefore, have been sued by the employee, contribution will be enforced (where complete indemnity is not available)—without renouncing the rule of *Halycon* where the impleaded party is the employer and Section 933 is operative.

The plexus of relations among shipowner, longshoreman (or other harbor worker), employer of longshoreman and third party tort-feasor acting concurrently with shipowner and (i) being the longshoreman's employer and having or

not having breached a duty owed to the shipowner and (ii) being a non-employer concurrent tort-feasor having or not having breached a duty to the shipowner, that plexus of relations is reaching maturity of definition in the cases. The question here is, how much of it is swept away by the 1972 enactment of Section 905(b) as between shipowner and stevedore-employer of the injured longshoreman who has sued the shipowner alleging his negligence, denying his own, and asserting (although not relying on) the fact that the unsafe condition complained was also a condition of unseaworthiness?

Section 905(b) now provides

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this

> subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

Analysis is helped if Section 933 is treated as (a) requiring the precise *Pope & Talbot* result, *i.e.*, that the compensation award does not reduce the damages recoverable against the third party wrongdoer; (b) definitely not depriving the employer-wrongdoer of any rights of suit he has against the third-party wrongdoer to recover for his own damage (including his liability to the longshoreman under the Act); (c) not itself the source of the wrong-doing employer's rights of action against the third-party wrongdoer, since those rights rest on subrogation and the whole range of legal duties that a shipowner may owe to a business visitor and its employees; and (d) really a time—regulatory mechanism determining the time during which the longshoreman must be accorded the prior and exclusive right to initiate suit based on the third-party tort (not on any tort committed against the stevedore or breach of contract duty committed against the stevedore by the shipowner). The shipowner's claimover against the stevedore or other third-party wrongdoer for indemnity or contribution is separate, normally a Rule 14 claim that, in pure indemnity law apart from Rule 14, is not ripe for suit until after the shipowner is cast in judgment and has paid it.

Was Section 905(b) meant, in exchange for abolishing the unseaworthiness ground of liability, to abolish every sort of right to pass on some or all of the shipowner's liability to the longshoreman to the employer? Even if that meant that a trivial, but legally sufficient, amount of negligence toward the longshoreman would enable the employer

to off-load to the shipowner his entire liability under the Act even though the employer's negligence was the most significant proximate cause of the accident, and the employer was in breach of duties that he owed to the shipowner in respect of the accident and damage?

The language of Section 905(b) leaves no room for escape from the conclusion that the section means exactly that sweeping and painful result. The examination of the background and history of the legislative change in Lucas v. "Brinknes" GES. Franz Lange G. m.b.h. & Co., K.G., 379 F.Supp. 759 E.D.Pa.1974, confirms the conclusion. Since the constitutional power of Congress to effect so sweeping a change is neither challenged nor conceded, it must not be considered at this time.

Since these considerations altogether dispose of Gulf's interest, the interests of justice require that it now receive its dismissal from the action.

It is, accordingly,

Ordered that the motion of defendant and plaintiff seeking joinder to strike the affirmative defense of the plaintiff defendant, or involuntary plaintiff Gulf Insurance Co. is denied and the motion of said plaintiff, defendant, and involuntary plaintiff to strike or dismiss the complaint bringing it into the case is granted; and it is further

Ordered that the Clerk is expressly directed now to enter judgment that defendant "plaintiff" seeking joinder A/S Arcadia, sued as Lief Hoegh and Co., Inc. take nothing as against plaintiff or defendant or involuntary plaintiff Gulf Insurance Company and that complaint—over under Rule 19(a) and the claims therein set forth are dismissed.

Judgment of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 73 C 1232

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff Seeking Joinder,

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff.

A memorandum and order of Honorable John F. Dooling, Jr., United States District Judge, having been filed on October 11, 1974, denying the motion of defendant and plaintiff seeking joinder, to strike the affirmative defense of the plaintiff, defendant, or involuntary plaintiff, to strike or dismiss the complaint bringing it into the case, and directing the Clerk to enter judgment, it is

Judgment of District Court

ORDERED and ADJUDGED that defendant "plaintiff" seeking joinder A/S Arcadia, sued as Lief Hoegh and Co., Inc. take nothing as against plaintiff or defendant or involuntary plaintiff Gulf Insurance Company and that complaint—over under Rule 19 (a) and the claims there in set forth are dismissed.

Dated: Brooklyn, New York
October 23, 1974

/s/ LEWIS ORGEL,
Clerk

OPPOSITION BRIEF

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FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-646

A/S ARCADIA,

Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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—against—

GULF INSURANCE COMPANY,

Respondent.

RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

Opinions Below

The opinion of the Court of Appeals is reported at —— F. 2d ——. The opinion of the District Court is reported at 386 F. Supp. 1081. Both opinions are reprinted in the Petitioner's Appendix at pp. 1A and 21A respectively.

Jurisdiction

The judgment of the District Court was entered on October 23, 1974 (p. 28A). The judgment of the Court of

Appeals was rendered on June 18, 1975. The orders of the Court of Appeals denying rehearing and rehearing in banc were entered on the 5th day of August, 1975.

The jurisdiction in this Court is invoked under 28 U.S.C. Sec. 1254(1) and 28 U.S.C. Sec. 2101(c).

The Petitioner Seeks To Have This Court Frustrate Not Only the Intention of Congress, But the Intent and Purposes of the Shipowners and Stevedores Who Actively Participated in the Formulation of the 1972 Amendments.

It was the intention of Congress that the stevedore, regardless of its negligence, should compensate its injured employee, and in place and stead of indemnity to the negligent shipowner, he would be made to pay increased compensation benefits from the $70.00 rate to the present $315.00 rate, with no ceiling on death claims.

It is more than evident from the history of the 1972 Amendments that it was a compromise between shipowners and stevedores with the interest of longshoremen and employees paramount. See *Lucas* v. *"Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974), a comprehensive opinion by Judge Huyett for an *ad hoc* panel of three district judges, for some of the colloquy in the Senate Sub-Committee, 379 F. Supp. at 767-72, which it is unnecessary to repeat.

It is well known that prior to the amendments there had been no increase in the rate of compensation to longshoremen by Congress since 1961. The employers-stevedores contended it was hard for them to pay any higher compensation because the compensation obligation had come to be not their only liability under Supreme Court precedents.

The Supreme Court held in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) that a longshoreman, like a seaman, could sue a shipowner for breach of warranty of unseaworthiness, without proof of negligence. This liability for unseaworthiness thus imposed was absolute and nondelegable. If the stevedore had caused the unseaworthiness, he was held to be liable for his breach of the warranty of workmanlike performance, and was liable to indemnify the shipowner, including Counsel fees even though the stevedore could not have been sued directly by his employee, the longshoreman, because of the latter's remedy against his employer was exclusively for compensation under the Act. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956) stressed the fact that "the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages".

From the history of the 1972 Amendments, it is more than evident that it was a compromise between shipowners and stevedores with the interest of longshoremen and employees paramount. See *Lucas* v. *"Brinknes" Schiffahrts Ges.*, supra.

Excerpts from the House Report No. 1441 (Education and Labor Committee), U.S. Code Congressional and Administrative News, 92nd Cong., 2nd Sess. pp. 4698 et seq. (1972) tell the story of the legislative compromise. After stating the background,

> "Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping com-

> panies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen." (p. 4699),

the Committee referred to the *Sieracki* and *Ryan*, supra, doctrines, and stated that

> "the rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." (p. 4703)

Consequently, the stevedore-employer by becoming indirectly liable to the longshoreman for greater damages than were recovered through a workmen's compensation claim. The potential rewards of this circular procedure made it increasingly popular and expensive.

This procedure drew increasing criticism, notably from Congress, which deplored the waste of judicial and financial resources involved. See H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess. 5 (1972); S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 9 (1972). The 1972 Amendments sought to eliminate that waste. They impose higher compensation payments upon the stevedore, and immunize him from indemnity actions by the vessel. The longshoreman enjoys greater compensation benefits, but sacrifices the leverage of the seaworthiness standard, which is replaced by negligence law.

The shipowner herein would like this Court to reinstate the indemnity problems which Congress sought to completely eliminate with the 1972 Amendments, this being its

primary consideration in undertaking the amendments. The petitioner claims that it cannot be held liable for the stevedore's negligence, if any. The stevedore, on the other hand, contends that the 1972 Amendments foreclose such an offset and argues, "under the amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it in whole or in part for such damages." Id. at 4704-05.

In reading all or part of 33 U.S.C. § 905(b), the Circuit Court rightfully interpreted it to mean to exclude liability by the employer to any extent, including the amount of the compensation payments. "If Congress had intended otherwise, it would simply have excluded employer liability for concurrent negligence 'except to the extent of its compensation payments.' " It is significant that no such exception was made.

The petitioner further argues that unless the stevedore be made to at least waive or forfeit its compensation lien whenever negligent, then there would be no incentive for safety on the part of the stevedore. This seems to be the chief thrust of its argument.

Nowhere is it pointed out to the Court that as a result of the 1972 Amendments which not only encompassed a greater number of employees, such as dock workers, but increased the compensation payments to injured longshoremen by approximately 530%. Pre-amendment, a longshoreman who lost a leg, would be awarded 288 weeks at $70.00 per week, a total of $20,160.00. As of 1974-1975, a longshoreman who averaged over $475.00 per week, and lost a leg, would be awarded 288 weeks at the maximum of $315.00 a week, a total of $90,720.00.

In a death case, where there is no ceiling, a widow and children are entitled to 66⅔% of the average weekly wage

of the deceased. Pre-amendment, at the rate of $70.00 per week, a widow and children received $3,640.00 a year. Post-amendment, a longshoreman who for the year prior to his death earned $30,000.00 a year (We have a number of such earners, particularly in Port Newark on containers.), his widow presently would receive $20,000.00 a year. Pre-amendment, a widow of such an earner, 35 years of age, with a life expectancy of 43 years, would receive $156,520.00. Post-amendment, at $20,000.00 a year, she would receive $860,000.00, a difference of $703,480.00.

Isn't this differential of the man with a leg off costing the stevedore an additional $70,560.00, and of a widow an additional expenditure of $703,480.00, of sufficient magnitude to create a strong incentive for promoting safety?

If not, then how could the stevedore's failure to recoup its compensation lien amount to incentive for safety as argued by the petitioner?

Petitioner further argues that the plaintiff may not recover against the shipowner unless he proves that the ship's negligence was solely responsible for this injury.

If this had been the intention of Congress in drafting Section 5(b), [33 U.S.C. 905(b)], Congress could easily have inserted the word "sole" so that it would have read "caused by the 'sole' negligence of the vessel". Was it the intent of Congress to give the ship so little incentive to avoid being negligent toward its longshoremen invitees?

There have been a number of decisions on the point at issue. *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974); *Croshaw* v. *Koninklijke*, 398 F. Supp. 1224; *Dodge* v. *Mitsui*, 1975 A.M.C. 1505; *Hubbard* v. *Great Pacific Shipping Co., Monrovia*, Civ. 74-289 (D.C. Dist. of Oregon June 16, 1975); *Santino* v. *Liberian Distance Transports, Inc.*,

524 73C2 (W.D. Wash. at Seattle June 2, 1975); *Shellman v. U.S. Lines Operators, Inc.*, 1975 A.M.C. 362 (Cent. Dist. Cal. 1974), all in respondent's favor. There are no conflicts between the Circuits.

In essence, petitioner is seeking, contrary to the intent of Congress, judicial legislation amending and changing the 1972 Amendments, after considerable effort by Congress, shipowners, and stevedores, to avoid the circuitous, expensive litigation and thereby increasing the benefits to the injured longshoreman. The petitioner would have this Court legislate a theory of indemnity that once again would restore the waste of judicial and financial resources which Congress sought to and did eliminate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that petition for writ of certiorari be denied.

Dated, Brooklyn, New York,
November 28, 1975.

Respectfully submitted,

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REPLY

BRIEF

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

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October Term, 1975

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A/S ARCADIA,

Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

PETITIONER'S BRIEF IN REPLY

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IN THE

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Respondent.

PETITIONER'S BRIEF IN REPLY

While much of the brief in opposition is dedicated to what amounts to an *in haec verba* instant replay of the Court of Appeals opinion and would ordinarily not call for a reply, several misconceptions with respect to the petition have surfaced which require correction in the interest of simplification of the issue before this Court.

Additionally, petitioner seeks to reemphasize, on the strength of intervening decisions, that it is within the power of this Court not only to interpret the LHWCA. but also to fashion new or reshape old rules of maritime law where Congress has not expressly acted.

I

1. Respondent on two occasions (pp. 4 and 7), erroneously seeks to charge petitioner with attempting to reinstate an indemnity theory of recovery against the steve-

dore. This, despite petitioner's express acknowledgment (pp. 8-9) that it considers an action for indemnification foreclosed by the amendments to §905 of the LHWCA.

2. A reading of the petition discloses, contrary to respondent's suggestion (p. 6), that petitioner is not pursuing an argument in this Court that it is only responsible for its sole negligence.

3. At the risk of appearing repetitious, it must be said that petitioner, rather than attempting to thwart the will of Congress, seeks to give meaning to the various Congressional expressions of purpose appearing in the legislative history. While the background and text of the amendments are not especially illuminating as to the survival of a "lien" theory of recovery to the stevedore or its underwriter, it is petitioner's position that the Congressional intent set forth in the petition (pp. 6-11) supports the view that Congress could not have contemplated that a negligent stevedore would be permitted to dodge its compensation liability by having such payments refunded to it or its underwriter in the form of a deduction from a longshoreman's recovery against an also negligent shipowner.

It seems to petitioner that the recitation by respondent (pp. 5-6) of increased benefits to longshoremen, rather than supplying safety incentives to the stevedore and/or its underwriter, tends more to exacerbate the problem by affording them proportionately greater encouragement to retrieve such payments from the shipowner.

II

Even those decisions adverse to the shipowners' position recognize an inequity in the way the Act is presently

construed, but acknowledge an impotency to act in view of this Court's prior decisions. Thus, the District Court herein referred (p. 27A) to the "painful result" of having the stevedore employer "off-load to the shipowner his entire liability under the Act" even where its negligence "was the most significant proximate cause of the accident".

The decision cited by respondent in *Lucas* v. *"Brinknes" Schiffahrt Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974) noted (p. 769)

> "This result may leave the shipowner in an unenviable position",

and concluded

> "It is for Congress to provide the proper balance. Court's sense of fairness can only prove disruptive of that balance."

It is of course precisely that equilibrium of rights which the shipowner seeks to preserve in filing this petition.

In *Croshaw* v. *Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975) also cited by respondent, the Court although constrained to follow an earlier decision, respectively disagreed with that interpretation of the 1972 amendments and noted the results decried by petitioner herein (p. 1232)

> "The inequities of this program are obvious. If the stevedore were 90% negligent, the 10% negligence of the shipowner would be sufficient to cripple him with the entire judgment. Some jurisdictions tolerate this, but I cannot."

The Court went on to state (p. 1233)

> "The manifest injustice of subjecting a joint tortfeasor to an arbitrary level of damages despite minimal culpability was recently condemned by the U.S. Supreme Court. In *United States* v. *Reliable Transfer Co., Inc.*, —— U.S. ——, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), the Court jettisoned the ancient admiralty rule of divided damages."
>
> • • •
>
> "Legislative history does not reveal whether Congress intended to protect the stevedore's equitable lien from his own negligent conduct as well. Such protection does not appear justified and would clearly violate fundamental principles of equity."

The opinion concluded (p. 1234) with the observation that the stevedore's right to reimbursement being equitable should be subject to equitable regulation.

As the many cases which have been simmering since the 1972 Amendments are now coming to a boil,* we witness the decisions of the Court of Appeals for the 9th Circuit on November 21, 1975 in *Shellman* v. *United States Lines*, —— F.2d —— (75-3071 and 75-3058) and *Dodge* v. *Mitsui Line*, —— F.2d —— (75-1442).**

The *Shellman* Court rejected the District Court proportionate reduction of plaintiff's recovery based on the per-

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* E.g. *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 44, (3rd Cir. 1975, Petition filed November 6, 1975, No. 75-674) would permit contribution under the LHWCA against a non-stevedore employer. See also *Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975) Nos. 75-502 and 75-505, cited in the petition.

** Petitioner understands the slip opinions are made available to this Court.

centage of stevedore negligence. The Court noted *Croshaw supra*, and also the within decision of the Court of Appeals. It specifically recognized the inequity* of saddling the shipowner with the negligence of the stevedore, but said that to reduce plaintiff's recovery because of that stevedore negligence "would simply shift the inequity from defendant United States Lines to Shellman" (p. 8). There is of course a clear distinction between *Shellman* and the within litigation in that any deprivation of the stevedore and/or carrier's "lien" would not reduce plaintiff's recovery since he is already required to pay it back.

Relying on this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1952), the *Shellman* Court said that it is for Congress and not the courts to provide a solution to this problem. While deferring in the body of the opinion to Congress under *Halcyon*, which as noted in the petition also said (p. 285) that this Court would "feel free" to fashion rules in this area, "if wholly convinced that it would best serve the ends of justice", the Ninth Circuit rather incongruously observes in footnote 2 that the lien theory was "judicially created", as indeed the petition herein so maintained (p. 10). That being so, there is, of course, no requirement to await further Congressional action.** *Croshaw* supra, confirms there was no indication Congress intended to protect the stevedore's equitable lien from its own negligent conduct.

Irrespective of the direction of their holdings, the lower courts with virtual unanimity believe that it is inequitable

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* The companion *Dodge* v. *Mitsui* case also questioned in footnote 1 "whether it was equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries".

** Perhaps an inappropriate term. Hearings began on the 1972 Amendments, November 16, 1967.

for a negligent stevedore and/or underwriter to escape its compensation obligation when there is a negligent shipowner on whom it may be imposed. There is agreement that the "lien" theory is of judicial not legislative lineage. Since the principal impediment to change has been this Court's *Halcyon* decision, petitioner submits that the time has come, in the language of that decision, to intervene and fashion a more equitable rule so that the ends of justice will best be served.

Dated: New York, New York
December 9, 1975

Respectfully submitted,

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—against—

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PETITION FOR REHEARING

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Supreme Court of the United States

October Term, 1975

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Petitioner,

—against—

GULF INSURANCE COMPANY,

Respondent.

PETITION FOR REHEARING

Petitioner respectfully moves for rehearing of the order of this Court entered on January 12, 1976 denying its petition for a writ of certiorari.

In its Brief in Reply, petitioner herein noted (p. 4) the then recent decisions of the United States Court of Appeals for the Ninth Circuit in *Shellman* v. *United States Lines*, —— F.2d —— (75-3071 and 75-3058) and *Dodge* v. *Mitsui Line*, —— F.2d —— (75-1442). These cases are also concerned with the question of whether the partially negligent stevedore may escape all financial responsibility under the new LHWCA.* The principal difference between these decisions and this one is that they possess a degree of finality which the within litigation does not.

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* Longshoremen and Harbor Worker's Compensation Act, 33 USC 901 et seq. Changes made by Public Law 92-576, approved October 27, 1972.

It is petitioner's understanding that a petition has already been filed in *Dodge* v. *Mitsui* on January 26, 1976 (75-1058) and a petition in *Shellman* v. *United States Lines* is imminent.

Since this Court may well be moved to grant to the petitions in the aforementioned cases and since the principles involved are identical, petitioner respectfully requests the Court to withhold disposition on this rehearing petition until such time as it considers the petitions in *United States Lines* v. *Shellman* and *Mitsui Lines* v. *Dodge*.

Should writs be granted in those cases, petitioner respectfully asks the Court to reconsider the denial of the petition herein and join the within case with the others for disposition.

Dated: New York, New York
February 4, 1976

Respectfully submitted,

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Certificate

I hereby certify that the foregoing petition for rehearing is submitted in good faith, is not for any purpose of delay and is restricted to the grounds above set forth.

Dated: New York, New York
February 4, 1976

.....

FRANCIS X. BYRN